No. 82-1409

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES BALKCOM, Warden,
Georgia State Prison,

Petitioner,

vs.

TERRY LEE GOODWIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO CERTIORARI

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CHARLES BALKCOM, Warden,
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BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the Court of Appeals is reported at 684 F.2d 794 and is included in Petitioner's Appendix 1. The opinion of the District Court is reported at 501 F.Supp. 317.

Jurisdiction

The judgment of the Court of Appeals was entered on September 3, 1982. A timely petition for rehearing en banc was denied on December 27, 1982. The petition for a writ of certiorari was filed February 16, 1983. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Should this Court grant Certiorari to determine whether the Court of Appeals was correct in following the Georgia Supreme Court's holdings, that the Eighth and Fourteenth Amendments require a jury to be instructed concerning their option to recommend life even if aggravating circumstances are found.

2. Should this Court grant Certiorari to determine whether the Court of Appeals exceeded its authority in considering Respondent's Sixth Amendment claims on habeas corpus and whether the Court of Appeals correctly applied its own binding precedents to the facts of the instant case on the ineffective assistance issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment:

In all prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed which district shall have been ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

United States Constitution, Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §2254(a):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

O. C. G. A. §17-10-30 (formerly §27-2534.1):

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in the charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed.

STATEMENT OF THE CASE

All the facts necessary for resolution of the Petition are contained in the opinion of the circuit court and Respondent's Reasons for Denying the Petition. What the Court of Appeals referred to as the "positive aspects" of trial counsel's representation are found at 684 F.2d at 817, Petitioner's Appendix 1, pg. 119.. The inadequacies of trial counsel's representation are catalogued post at pages 11-12 , with citation to the opinion of the Court of Appeals.

Concerning the jury charge issue, the "Charge of the Court" on sentencing is set out in its entirety in Respondent's Appendix A.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS ON THE JURY CHARGE ISSUE IS FULLY IN ACCORD WITH THE CONTROLLING GEORGIA LAW AS ANNOUNCED IN ZANT-v-GADDIS.

Petitioner claims that the decision of the Court of Appeals presents "a clear and direct conflict" with some twenty-one decisions of the Georgia Supreme Court on the jury charge issue. Of the twenty-one decisions cited, Petitioner discusses only two, Spivey v. State, 241 Ga. 477; 246 S.E.2d 288 (1978) and Zant v. Gaddis, 247 Ga. 717; 279 S.E.2d 219 (1981) Petition for Certiorari, pp. 24-25. As will be shown below, not only are these opinions not in direct conflict with the Court of Appeals,but Zant v. Gaddis is literally on all fours in support of the holding in the instant case.

To begin with, Respondent would like to point out that Petitioner's repeated assertions that the Eleventh Circuit requires "that a trial court recite a magic litany" in sentencing jury charges is just not true. The court below specifically held that:

> As noted in Spivey, the trial court is not constitutionally required to use the words 'mitigating circumstances' in the capital sentencing charge. 'So long as the instruction clearly communicates that the law recognizes the existence of circumstances which do not justify or excuse the offense but which, in fairness or mercy, may be considered as extenuating or reducing the degree of moral culpability . . . the constitutional requirement is satisfied.'

Goodwin v. Balkcom, 684 F.2d at 803, Note 7, quoting in part Spivey v. Zant, 661 F.2d 469, 471, (former 5th Cir. Unit B 1981) cert. denied _____U.S. _____(1981). Compare: O. G. C. A. §17-10-30(b) ("The judge . . . shall include in his instructions to the jury for it to consider, any mitigating circumstances . . . .").

More importantly, however, the Eleventh Circuit opinion below not only does not conflict with the controlling Georgia Supreme Court cases but actually adopts the controlling Georgia decisional standard.

The court below reversed Terry Goodwin's sentence inter alia because the trial court failed to charge concerning:

> . . .the option to recommend a life sentence although aggravating circumstances are found . . . (684 F.2d at 801-802).
>
> Nowhere does the charge even slightly hint about the option to impose life imprisonment even though aggravating circumstances are found. (684 F.2d at 802).

As early as 1977, the Georgia Supreme Court announced this requirement. In Flemming v. State, 240 Ga. 142, 146; 240 S.E.2d 37 (1977), the court reversed a death sentence because:

> [T]he court failed to make clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance. Id.

This same requirement was incorporated into the test announced in Spivey v. State, 241 Ga. 477, 481; 246 S.E.2d 288 (1978) which is relied upon by Petitioner. The Spivey test requires instructions which inform a reasonable juror that:

> Even though he might find one or more of the aggravating circumstances to exist, [he] would know that he might recommend life imprisonment.

Spivey v. State, 241 Ga. 477, 481; 246 S.E.2d 288 (1978). Petition for Certiorari, pp. 24-25.

For a short period of time after the announcement of the Spivey test the Georgia Supreme Court wavered in divided opinions over the application of the requirements of Flemming v. State.

The instant case was decided during this period of uncertainty. As Justice Marshall and Chief Justice Hill stated in their dissent in sub nom Goodwin v. Hopper, 243 Ga. 193, 197-198; 253 S.E.2d 156, 160 (1979):

> Here in Goodwin's ultimate struggle, the court declines to apply the ultimate test . . . .
>
> Lockett v. Ohio, 438 U.S. 586 (1978) requires that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death. (cite omitted). Here the judge did not instruct the jury in anyway even unclearly, about the option to recommend against death as required by Lockett . . . .

See also e.g. Morgan v. State, 241 Ga. 485; 246 S.E.2d 198 (1978). (Marshall, Hill and Bowles, J.J., dissenting).

This period of uncertainty concerning the correct application of Flemming v. State and the Spivey test ended with the announcement of Zant v.

Gaddis, 247 Ga. 717, 720; 279 S.E.2d 219, 222 (1981). In Zant v. Gaddis, Justice Marshall was no longer in the dissent; in fact, he authored the opinion for a unanimous court which held:

> Considering the charge as a whole, we find it does not meet the test of Spivey v. State, and that the charge as given violates Petitioner's constitutional rights under the Eighth and Fourteenth Amendments. Jurek v. Texas, 428 U.S. 262 (1976). See also . . . Flemming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977) . . . .
>
> /T/he trial court's charge failed to meet the . . . requirement of the Spivey test: that it inform the reasonable juror that he could recommend life imprisonment even if he should find the presence of one or more of the statutory aggravating circumstances. Nowhere in the charge is this option made clear to the jury. Therefore, the trial court's judgment granting the writ of habeas corpus must be affirmed and the petitioner must be granted a new trial as to sentence. Id. at 247 Ga. 720, 240 S.E.2d 222 (1981).

As the Eleventh Circuit recognized below, the charge in Zant v. Gaddis is "identical to Goodwin's insofar as the option to recommend against death is unclear." (684 F.2d at 803, Note 9)[1]

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[1]The charges in the two cases, applicable to the murder count for which each received the death penalty are as follows:

GADDIS	GOODWIN
All right, ladies and gentlemen, you having found the defendant guilty of the offenses of murder . . . it is now your duty to determine within the limit prescribed by law, the penalty that shall be imposed as punishment for each of those offenses in the respective indictments. In reaching this determination, you are authorized to consider all of the evidence received by you in open court in both phases of the trial of all cases. You are authorized to consider all the facts and circumstances of the case heretofore submitted to you. Under the law of this State, every person guilty of the offense of murder shall be punished by life in the penitentiary or death by electrocution . . .	Ladies and Gentlemen of the Jury, you having found the defendant guilty of the offense of murder, it is now your duty to determine within the limits prescribed by law, the penalty that shall be imposed as punishment for that offense. In reaching this determination, you are authorized to consider all of the evidence received by you in open court in both phases of this trial. You are authorized to consider all of the facts and circumstances of the case. Under the laws of this state, every person guilty of the offense of murder . . . shall be punished by life in the penitentiary or death by electrocution . . .
In the event that your verdict is life imprisonment, in any of the charges under consideration by you, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that is your verdict, you would add to the verdict, already found by you, an additional verdict as follows: "and we fix his punishment at life imprisonment."	In the event that your verdict is life in prison, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as life imprisonment." . . . .

(Footnote continued on following page.)

Since the Georgia Supreme Court's unanimous decision in Zant v. Gaddis, that court has consistently applied Zant and its holding as the controlling law in Georgia. See: Jarrell v. Zant, 248 Ga. 492, 493; 284 S.E.2d 17, 17-18

(Footnote continued from previous page)

GADDIS	GOODWIN
You may, however, if you see fit, and if that be your verdict fix his punishment as for death, which would require a sentence by the Court of death by electrocution. I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution, you must find evidence of statutory, aggravating circumstances, as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law. I charge you that a finding of statutory, aggravating circumstance, or circumstances, shall only be based upon evidence convincing your minds, beyond a reasonable doubt and to the exclusion of every other reasonable hypothesis, as to the existence of one or more of the following factual conditions in connection with the defendant's perpetration of the act for which you have found him guilty in each instance. They are: (The court here charged aggravating circumstances. Ga. Code §17-10-3(b)(1)(2)(4)(6)(7) (formerly §27-2534.1)). The statutory instructions that you are authorized to consider will be submitted to you in writing to be used by you in your deliberations. If your verdict would be a recommendation of death, you would add to the verdict already found by you an additional verdict as follows: "and we fix punishment as death." Additionally, if you impose the death penalty, you must designate in writing the aggravating circumstance or circumstances which you find beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis, that existed as to each charge of murder . . . . Your verdict must be agreed upon by all twelve of you, it must be in writing, entered upon the punishment verdict form furnished to you by the Court, date it, and signed by your foreman, and return each of them into court for publication. You may retire and begin your deliberations after you have received the indictments, the evidence adduced on the trial, and then determine the penalty or punishment that shall be imposed in each indictment, and the number of aggravating circumstances upon which you based that decision, if any.	You may, however, if you see fit and if that be your verdict, fix his punishment as death for murder, which would require a sentence by the court of death by electrocution. I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution you must find evidence of statutory aggravating circumstances as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law. I charge you that a finding of statutory aggravating circumstance or circumstances shall only be based upon evidence convincing your minds beyond a reasonable doubt as to the existence of one or more of the following factual conditions in connection with the defendant's perpetration of the act for which you have found him guilty. They are: (The court here charged aggravating circumstances. Ga. Code §17-10-3(b)(2) and (4) (formerly §27-2534.1)). The statutory instructions that you are authorized to consider will be submitted in writing to you, the Jury, for your deliberations. If your verdict should be a recommendation of death, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as death." Additionally, you must designate in writing the aggravating circumstance or circumstances which you find beyond a reasonable doubt. Your verdict should be agreed to by all twelve of your members. It must be in writing, entered upon the indictment, dated, and signed by your foreman or forelady and returned into court for publication. You may now retire to the Jury Room, elect one of your number as foreman or forelady, and begin your deliberations. These instructions, by law, are to be sent out to you. At the last minute, I made some changes in my own handwriting. And I do not mean to be facetious at this grave stage of this trial, but it might be that you cannot read my writing. And if so, if you will please tell the Baliff, I will have them typed.
Now, you may retire.	You may now retire to the Jury Room and begin your deliberations.

(The complete charges are attached as Exhibit A (Goodwin); Exhibit B (Gaddis).

(1981) (reversing because the charge did not conform to Zant v. Gaddis) Johnson v. Zant, 249 Ga. 812; 295 S.E.2d 63, 66 (1982) ("charge met the requirements of . . . Zant v. Gaddis") Accord: Cervi v. State, 248 Ga. 325, 333; 282 S.E.2d 629, 636-637 (1981) ("the form specifically provided for the imposition of a life sentence even though the jury found the existence of an aggravating circumstance") Waters v. State, 248 Ga. 355, 370, 283 S.E.2d 238, 251 (1981) ("charge . . . informed jury they could recommend life even if they found the existence of a statutory aggravating circumstance").

In short, rather than being in conflict with the opinions of the Georgia Supreme Court, the Eleventh Circuit in the instant case has actually ratified and harmonized Georgia death penalty law by bringing Terry Goodwin's case into constitutional conformity with the controlling decisional law of Georgia. i.e. Zant v. Gaddis, Accord: Flemming v. State, (supra); Spivey v. State, (supra); Jarrell v. Zant, (supra); Johnson v. Zant, (supra).

Moreover, both courts' holdings on this issue are securely grounded in this Court's holdings in Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 292 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); and Bell v. Ohio, 438 U.S. 637 (1978). As the Court of Appeals realized:

> [The] constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision. We read Lockett and Bell, then, to mandate that the judge clearly instruct the jury about . . . the option to recommend against death.
> Goodwin v. Balkcom, 684 F.2d at 801 quoting Chenault v. Stynchombe, 581 F.2d 444, 448 (5th Cir. 1978).

II. THE COURT OF APPEALS APPLIED, AS EVEN PETITIONER ADMITS SUB SILENTO, THE CORRECT STANDARD FOR DETERMINING INEFFECTIVE ASSISTANCE OF COUNSEL.

A. INTRODUCTION

Petitioner's question presented on the ineffectiveness of assistance claim presents two reasons for this Court to grant certiorari: 1. That the Eleventh Circuit "exceeded its authority as a federal Habeas Corpus Court"; 2. That there is a conflict between the Eleventh Circuit and Unit B of the former Fifth Circuit.

To begin with, the assertion that the Eleventh Circuit "exceeded its authority" is not even arguably correct. The federal courts are required and obligated to test trial counsel's action and inactions to see if they meet constitutional standards. 28 U.S.C.§2254 See: e.g. Cuyler v. Sullivan, 446 U.S. 335 (1980).

B. SINCE THE FORMER FIFTH CIRCUIT, UNIT B AND THE ELEVENTH CIRCUIT ARE THE SAME COURT, THERE CAN BE NO INTERCIRCUIT CONFLICT.

Petitioner's second assertion of a conflict between the Eleventh Circuit and the former Fifth Circuit Unit B is equally erroneous. Specifically, Petitioner cites the case of Washington v. Strickland, 693 F.2d 1243 (former Fifth Cir., Unit B 1982) (en banc) as being in conflict with the Eleventh Circuit. In the instant case, when Judge Hatchett writes of the en banc court in Washington v. Strickland, he refers to it as "this court sitting en banc". (684 F.2d at 818 Note 19). This is because, Unit B of the former Fifth Circuit is the Eleventh Circuit.[2] Therefore, there can be no conflict between Courts of Appeals under this Court's Rule 17.1(a) based upon alleged differences between Washington v. Strickland and the opinion in the instant case.

> Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari Stern & Gressman, Supreme Court Practice pp. 275-276. (5th Ed. 1978).

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[2]Congress, by statute (P.L. 96-452, 94 Stat. 1995 (1980)) divided the former Fifth Circuit into two new courts as of October 1, 1981. By administrative order, the former Fifth Circuit was divided into two units in the transitional period. Unit A was equivalent to the new Fifth Circuit with Unit B encompassing the present Eleventh Circuit. By statute id. and by decision (Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc) cases submitted for decision in the present Eleventh Circuit prior to October 1, 1981 bear the former Fifth Circuit Unit B caption and cases submitted for decision after that date bear an Eleventh Circuit caption. (See: discussion of Chief Judge Godbold in Bonner v. (Footnote continued on following page)

When the Petitioner moved for en banc consideration in the instant case, that petition was considered by the same Judges (and court) who sat in Washington v. Strickland.[3] Rehearing en banc was denied below just three days after the court announced Washington v. Strickland.

Since the alleged conflict is one between Judges of the same court and circuit, it does not present a reviewable conflict under this Court's Rule 17.1(a). As Mr. Justice Harlan once wrote:

> " . . .decisions between different panels of the same court of appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the court of appeals itself . . . ."
> Mr. Justice Harlan, Manning the Dikes, 13 Record of N.Y.C.B.A. 541, 552 (1958).

Therefore, even if there were a conflict between Washington v. Strickland and the instant case, it would not be an intercircuit conflict under this Court's Rule 17.1(a) and certiorari should be denied.

C. THE CIRCUIT COURT CORRECTLY APPLIED ITS OWN LAW TO THE FACTS OF THE INSTANT CASE

Petitioner admits the court below used the correct standard for evaluating trial counsel's representation, i.e.:

> The Sixth Amendment . . . entitles a state criminal defendant to counsel reasonably likely to render and rendering reasonably effective assistance. (emphasis added).
> Goodwin v. Balkcom, 684 F.2d at 804; Petition for Writ of Certiorari, p. 32.

Petitioner admits that the court used the correct methodology in applying the standard to the facts of the instant case.

> "The methodology for applying the standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based upon a totality of circumstances and the entire record. (emphasis in original).
> Goodwin v. Balkcom, 684 F.2d at 804 quoted with approval Petition for Writ of Certiorari, pp. 32 and 33.

(Footnote continued from previous page)
City of Prichard, id.). Under either caption, they are the binding precedent and decisions of the Eleventh Circuit. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982) (en banc Unit B decisions of the former Fifth Circuit are binding precedent of the Eleventh Circuit).

[3]Under the Eleventh Circuit Rules, the court was fully authorized to convene an en banc court if it thought there was a conflict between Washington v. Strickland and the instant case. In fact, in his motion for rehearing, en banc on the ineffectiveness issue, Petitioner cited almost exclusively former Fifth Circuit cases in his reasons for requesting rehearing en banc.

Likewise, as to prejudice, the court below clearly held:

> [F]ederal habeas corpus relief is proper only where a showing of prejudice accompanies the initial and distinct determination of ineffective assistance. This is true even where counsel's preparation and investigation have been adjudged woefully inadequate.
> Goodwin v. Balkcom, 684 F.2d at 805 (11th Cir. 1982).

Petitioner's real objection therefore, is not with the standard employed. Rather, Petitioner's only objection is to the application of what even Petitioner admits is the correct law to the specific facts of the instant case.

Applying this standard to the facts, the Circuit Court found that based upon the "totality of the circumstances and the entire record" that trial counsel "was not reasonably likely to render, and did not render, reasonably effective assistance . . . ." (684 F.2d at 817); the Circuit Court found and articulated instances of actual prejudice to Terry Goodwin's defense (684 F.2d at 817-820) and found that "the prejudice [in the instant case] is so obvious that a sufficient degree of prejudice exists under any standard . . . ." (684 F.2d at 818 Note 19).

If this Court wishes to wade through the lengthy volumes of the record to determine if the law was correctly applied to the facts, it would determine, as the court did below that the failings of Terry Goodwin's trial counsel are staggering. Applying the law to the facts, the Circuit Court found that trial counsel failed to interview or investigate at least five crucial prosecution witnesses. (684 at 810). Nor did he try through cross-examination to impeach them even though he:

> Never believed any of them, any of those colored boys, because it seemed like, appeared at the time, that they were doing that to help themselves with the sheriff. (Quoting trial counsel, 884 F.2d at 811).

The Circuit Court found (1) that counsel failed even to interview the arresting officer; (2) and was familiar with neither the facts nor the applicable law concerning Terry Goodwin's arrest; (3) counsel failed to object to jurors improperly disqualified in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). (684 F.2d at 814-816); (4) counsel failed to even review the transcript

for Witherspoon violations on appeal (684 F.2d at 816 Note 18a); (5) failed to object to the victim's family being allowed to sit inside the bar of the court throughout the trial; (6) failed to request jury changes on Terry Goodwin's only asserted defense; (7) failed to request a change on mitigating circumstances and (8) failed to object when none was given; (9) that counsel failed to object to inadmissible evidence used by the state in aggravation, and (10) failed to object as the District Attorney repeatedly led his witnesses through their testimony (See discussion 684 F.2d 816-817). The Circuit Court found that in both their opening and closing arguments, trial counsel were quick to point out their appointed status in representing this "little old nigger boy". (See excerpts of counsel's argument quoted 684 F.2d at 805, Note 13 and accompanying text). What the circuit court referred to as counsel's "divided allegiance" (684 F.2d at 810) was caused by counsel's fear of "community ostracism" (see discussion at 684 F.2d 805-806). This same fear prevented counsel from challenging the composition of the grand and petit jury pools[4] which "grossly" under-represented blacks. 684 F.2d 806-810. This fear of community pressure acted like a cancer in Terry Goodwin's counsel and infected, weakened, and sucked the very marrow from his defense.

As the court below stated:

> Admitted concerns over community ostracism do more than inhibit a lawyer's actions at trial where his performance is visible by fellow citizens. An attitude such as this impairs the vitality of investigation, preparation, and representation that all clients deserve, indigent or otherwise. Fears of negative public reaction to the thought of representing an unpopular defendant surely hamper every facet of counsel's functions. Moreover, reminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused.
> 684 F.2d at 806.

The Circuit Court was clearly shocked by the level of ineffectiveness shown.

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[4]Petitioner asserts at pg. 39 of its Petition that "approximately 25 percent of Respondent's trial jury" was black. Trial counsel testified that there were one or two blacks on Respondent's 12-person jury. 684 F.2d 807, Note 14.

> In the totality of the circumstances of this case, counsel's lack of investigation and general attitude, when taken together, deprived Goodwin of the zealous representation due any client, even those accused of committing atrocious acts . . . When counsel's performance is placed in the balance of the entire record . . . we can only conclude that his [trial counsel's] failures were grossly disproportionate to the positive aspects of his representation . . . . 684 F.2d at 817.

To paraphrase Powell v. Alabama, 287 U.S. 45, 69 (1932): What good is "the guiding hand of counsel" if he is ignorant of both the facts and the law. Or as Mr. Justice Sutherland continues: "If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect". Id. In the instant case, it is undisputed that Terry Goodwin is mentally retarded with a mental age somewhere between 9 yrs. 6 mos. and 14 years. (684 F.2d at 797, Note 1.)

Based upon the totality of trial counsel's representation, the Circuit Court found counsel to be ineffective and that "under any standard" he had been prejudiced thereby. As shown above, Petitioner cannot claim that the Washington v. Strickland standard is not the controlling standard of the Eleventh Circuit. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982). Nor can he claim that the Eleventh Circuit was not given an opportunity to review the instant case en banc, after it announced Washington v. Strickland, if it had thought there was a conflict.

What Petitioner really wants this court to do is to review a voluminous and lengthy record to determine whether or not the Eleventh Circuit correctly applied its own standard in what is essentially a sui generis factual dispute. As Mr. Justice Holmes wrote in United States v. Johnson, 268 U.S. 220, 227 (1925):

> We do not grant certiorari to review evidence and discuss specific facts.

This is especially true when such a review could only leave this Court, as it left the Eleventh Circuit, convinced that trial counsel's "failures were grossly disproportionate . . . .".

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

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ATTORNEYS FOR RESPONDENT.

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APPENDIX A

Sentencing Instructions in sub nom State v. Goodwin

believe that you have religious convictions. I implore you to search your mind and your heart and ask yourselves Am I doing right? One day, sometime in eternity, there wi be a great Judgement Day and we will all be called to stan before the Lord God Almighty and there to answer for our deeds done here on earth.

And when the Book of Like is opened to August 27, 197 and there your verdict, open for all to see, says "Kill him. Kill him." And the Lord God asks you just one quest "Why? Why?" What will your answer be? What will your answer be?

CHARGE OF THE COURT

Ladies and Gentlemen of the Jury, you having found the defendant guilty of the offense of murder and armed robbery, it is now your duty to determine within the limit prescribed by law, the penalty that shall be imposed as punishment for that offense.

In reaching this determination, you are authorized to consider all of the evidence received by you in open court in both phass of this trial. You are authorized to consid all of the facts and circumstances of the case.

Under the laws of this state, every person guilty of the offense of murder or armed robbery shall be punished by life in the penitentiary or death by electrocution. And under the laws of this STate, every person guilty of the offense of armed robbery shall be punished by life in the penitentiary or death by electrocution or by from one to twenty years in prison.

In the event that your verdict is life in prison, the punishment the defendant would receive would be imprisonment in the penitentiary for and during the remainder of his natural life. If that be your verdict, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as life imprisonment."

If you find--excuse me, let me begin again. If you should decide to sentence the defendant for the offense of armed robbery, then the form of your verdict would be, "We, the Jury, sentence the defendant to 'blank' years," and where the Court has used the term 'blank', you would insert the term of years to which you sentence this defend for the offense of armed robbery.

You may, however, if you see fit and if that be your verdict, fix his punishment as death for murder, which woul require a sentence by the court of death by electrocution.

I charge you that before you would be authorized to find a verdict fixing a sentence of death by electrocution you must find evidence of statutory aggravating circumstan as I will define to you later in the charge, sufficient to authorize the supreme penalty of the law.

I charge you that a finding of statutory aggravating circumstances or circumstances shall only be based upon evidence convincing your minds beyond a reasonable doubt a

to to the existence of one or more of the following factual conditions in connection with the defendant's perpetration of the act for which you have found him guilty. They are: Number one, the offense of murder was committed while the offender was engaged in the commission of another capital felony.

Two, the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

The statutory instructions that you are authorized to consider will be submitted inwriting to you, th e Jury,for your deliberations. If your verdict should be a recommendation of death, you would add to the verdict already found by you, an additional verdict as follows: "And we fix his punishment as death." Additionally, you must designate in writingthe aggravating circumstance or circumstances whic you find beyond a reasonable doubt.

Your verdict should be agreed to by all twelve of your members. It must be in writing, entemd upon the indictment, dated, and signed by your foreman or forelady and returned into court for publication.

Now if you fix a sentence for murder, the offense of armed robbery would merge with the offense of murder and you would not need to specify any sentence for the offense

of armed robbery.

You could not set a sentence for both offenses of armed robbery and murder, but must select which offense you desire to sentence--to which you desire to sentence the defendant.

You may now retire to the Jury Room, elect one of your number as foreman or forelady, and begin your deliberations These instructions, by law, are to be sent out to you. At the last minute, I made some changes in my own handwriting. And I do not mean to be facetious at this grave stage of this trial, but it might be that you cannot read my writing And if so, if you will please tell the Bailiff, I will have them typed.

You may now retire to the Jury Room and begin your deliberations.

(Whereupon, the Jury was retired from the courtroom at 3:50 o'clock p.m.)

(Recess.)

THE COURT: I want to make this announcement before this verdict is returned, if you cannot find a seat, you will have to go out in the hallway. If you will turn aroun and look, we have Deputy Sheriffs all around the room. Now I am not going to tolerate any outburst. I want everyone to be completely quiet when the verdict is returned, no matter what the verdict might be.

IN THE SUPERIOR COURT OF JEFFERSON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	Indictment No. 23: Burglary
VS.	Indictment No. 24: Burglary
BILLY SUNDAY DIRT,	Indictment No. 25:
BOBBY GENE GADDIS,	Count One: Armed Robbery
CHARLES DAVID REED, and	Count Two: Armed Robbery
WILLIAM EUGENE OTWELL,	Indictment No. 26:
Defendants.	Count One: Armed Robbery
	Count Two: Armed Robbery
	Indictment No. 27:
	Count One: Murder
	Count Two: Murder

CHARGE OF THE COURT ON PUNISHMENT

All right, ladies and gentlemen, you having found the def- dant guilty of the offenses of murder and armed robbery, it is your duty to determine within the limit prescribed by law, the alty that shall be imposed as punishment for each of those off- in the respective indictments. In reaching this determination, you are authorized to consider all of the evidence received by in open court in both phases of the trial of all cases. You a- authorized to consider all the facts and circumstances of the heretofore submitted to you. Under the law of this State, eve- person guilty of the offense of murder shall be punished by li-

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the penitentiary or death by electrocution.

Under the laws of this State, every person guilty of the fense of armed robbery shall be punished by life in the penite or death by electrocution, or by confinement in the penitentia for a period of not less than one year and not more than twent years.

In the event that your verdict is life imprisonment, in a of the charges under consideration by you, the punishment the dant would receive would be imprisonment in the penitentiary and during the remainder of his natural life. If that is your dict, you would add to the verdict, already found by you, an a tional verdict as follows: "and we fix his punishment at life imprisonment."

You may, however, if you see fit, and if that be your ve fix his punishment as for death, which would require a sentenc the Court of death by electrocution.

I charge you that before you would be authorized to find verdict fixing a sentence of death by electrocution, you must evidence of statutory, aggravating circumstances, as I will d to you later in the charge, sufficient to authorize the supre penalty of the law.

I charge you that a finding of statutory, aggravating ci stance, or circumstances, shall only be based upon evidence c vincing your minds, beyond a reasonable doubt and to the excl of every other reasonable hypothesis, as to the existence of

more of the following factual conditions in connection with the defendant's perpetration of the act for which you have found hi guilty in each instance. They are:

Aggravating circumstance number one: The offense of murde was committed while the offender was engaged in the commission another capital felony, armed robbery, or the offense of murder was committed while the offender was engaged in the commission the offense of burglary.

Aggravating circumstance number two: The offense of armed robbery was committed while the offender was engaged in the com sion of another capital felony, murder, or the offense of armed robbery was committed while the offender was engaged in the com sion of the offense of burglary.

Aggravating circumstance number three: The offense of mur was outrageously or wantonly vile, horrible or inhumane, in tha involved torture or depravity of mind.

Aggravating circumstance number four: The offense of armc robbery was outrageously or wantonly vile, horrible or inhumanc that it involved torture or depravity of mind.

Aggravating circumstance number five: The offender commi the offense of murder for himself or another, for the purpose c receiving money or any other thing of monetary value.

Aggravating circumstance number six: The offender caused directed another to commit murder or committed muder as an ager or employee of another person.

The statutory instructions that you are authorized to co will be submitted to you in writing to be used by you in your liberations. If your verdict would be a recommendation of de you would add to the verdict already found by you an addition verdict as follows: "and we fix punishment as death."

Additionally, if you impose the death penalty, you must nate in writing the aggravating circumstance or circumstance you find beyond a reasonable doubt, and to the exclusion of c other reasonable hypothesis, that existed as to each charge c murder and armed robbery for which you have found the defend guilty.

Your verdict must be agreed upon by all twelve of you, be in writing, entered upon the punishment verdict form furn to you by the Court, date it, and signed by your foreman, and each of them into court for publication.

You may retire and begin your deliberations after you h received the indictments, the evidence adduced on the trial, then determine the penalty or punishment that shall be impo each indictment, and the number of aggravating circumstance which you base that decision, if any.

Now, you may retire.

Ladies and gentlemen, if you desire to go to lunch the the bailiffs and remember the instructions but retire to th room and we'll forward to you the instructions along with t formation sheet and the indictments. You may retire.

No. 82-1409

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

CHARLES BALKCOM, Warden,
Petitioner,
vs.
TERRY LEE GOODWIN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

Comes now Respondent pursuant to Rule 46 of the Rules of the Supreme Court of the United States and moves this Court to allow Respondent to proceed in forma pauperis in the above-styled case and shows this Court as follows:

1. Respondent has previously sought and been granted leave to proceed in forma pauperis in this Court, the Superior Court of Walton County, the Superior Court of Tatnell County, the Georgia Supreme Court, the United States District Court for the Middle District of Georgia and the United States Court of Appeals for the former Fifth Circuit.

2. The undersigned have been appointed pursuant to the Criminal Justice Act of 1964, as amended to represent Respondent in the instant case.

WHEREFORE, Respondent respectfully requests leave to proceed in forma pauperis in this Court.

Respectfully submitted,

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